1962

American Savings and Loan Association v. Clinton H. Anderson et al : Brief of Respondent

Utah Supreme Court

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.
Merrill K. Davis; Davis and Bayles; Attorneys for Cross-Defendants and Respondents;
F. Robert Bayle; Wallace R. Laughnor; Hurd, Bayle & Hurd; Attorneys for Cross Complainant and Appellant;

In the Supreme Court of the State of Utah

AMERICAN SAVINGS AND LOAN ASSOCIATION, a corporation,
Plaintiff,

—vs.—

CLINTON H. ANDERSON, RUTH C. McOMBER, HARRY BERMAN, JOSEPH JERRY JEREMY, and JACQUELINE JEREMY, his wife, ROBERT J. McRAE, MRS. ROBERT J. McRAE, his wife, CHARLES C. CHAFFEE, JR., and MRS. CHARLES C. CHAFFEE, JR., his wife,
Defendants.

and

HARRY BERMAN,
Cross-complainant and Appellant,

—vs.—

JOSEPH JERRY JEREMY and JACQUELINE JEREMY, his wife,
Cross-defendants and Respondents.

No. 9566

Brief of Respondent

Appeal from a Judgment of the Third Judicial District Court for Salt Lake County
Honorable Merrill C. Faux, *Judge*

MERRILL K. DAVIS
of
DAVIS AND BAYLES
53 East Fourth South Street
Salt Lake City 11, Utah
Attorneys for Cross-Defendants and Respondents

F. ROBERT BAYLE and
WALLACE R. LAUCHNOR
of
HURD, BAYLE & HURD
1105 Continental Bank Bldg., SLC 1, Utah
Attorneys for Cross Complainant and Appellant

TABLE OF CONTENTS

CASES CITED

judgment against them on a certain promissory note secured by two second mortgages on real property.

DISPOSITION IN LOWER COURT

The case was tried to the Court. From a verdict and judgment for the Cross-defendants and against the Cross-complainant, no cause of action, the Cross-complainant appeals.

RELIEF SOUGHT ON APPEAL

Cross-complainant seeks a reversal of the judgment, and judgment for the Cross-complainant, or a new trial.

STATEMENT OF FACTS

The original action was brought by the plaintiff, American Savings and Loan Association as first mortgagee to foreclose its mortgage on real property located in Salt Lake City, Utah. Joseph Jerry Jeremy and wife had sold this residence property to defendants Ruth C. McOmber and to her friend Clinton H. Anderson. Mrs. McOmber and Mr. Anderson co-signed a note as part payment on this home and delivered the same to Mr. and Mrs Jeremy, Cross-defendants. Anderson and McOmber also each signed second mortgages to secure the note, which was in the sum of $4500.00, and delivered the mortgages to the Jeremys.

Dr. Harry Berman, cross-complainant owned a home in Salt Lake City which had been listed for sale for some time (TR. 44, 147). Dr. Berman requested a good friend of his, Sterling Webber, who was a real estate broker to help sell the property. (TR. 146, 147, 148). The Jeremys were looking for a home to purchase having recently sold their own to Anderson and McOmber (TR. 122). Mr. Webber's saleslady met the Jeremys and arranged for Mrs. Jeremy to see the residence. She did so and later returned with her husband. They told the saleslady that if Dr. Berman would accept the $4500.00 note and the two second mortgages that they had received from Anderson and McOmber from the sale of their former home, they would buy the Berman home (TR. 7, 123). The Bermans accepted the proposal and the Holt-Webber Agency handled the closing of the sale. Mr. Webber prepared the necessary documents for the closing. Prior to the closing on October 10, 1959, Mr. Webber states that Dr. Berman called him by telephone and asked if the Jeremys were willing to guarantee this note and the second mortgage. (TR. 155, 156). Mr. Webber states he telephoned Mr. Jeremy the same day and asked him to guarantee the note, but was told by Mr. Jeremy that he would not do so. (Tr. 156). Mr. Jeremy refused to sign, endorse, or guarantee the note for $4500.00. Mr. Jeremy told Mr. Webber that he had too many other obligations including a proposed "side note" with Dr. Berman for $3000.00 as additional balance due and owing to Dr. Berman, and stated that if the sale of the home hinged on his guaranteeing the $4500.00 note, he would not be able to buy the residence (Tr. 198). Mr. Webber testified that he then was quite certain that he notified Dr. Berman of Mr. Jeremy's decision shortly after his discussion with Mr. Jeremy, and told Dr. Berman that Mr. Webber would have to prepare an assignment of the note to him (Tr. 157, 158). Dr. Berman denied having ever discussed the matter of guaranteeing the Anderson-McOmber note with anyone before or at the time of the sale (Tr. 34, 260).

When the sale was closed on October 10, 1959, Mr. Webber prepared a written assignment as a separate document wherein Mr. and Mrs. Jeremy assigned the Anderson-McOmber note, agreement and mortgage dated August 10, 1959, to Dr. Berman and his wife. Mr. Webber, a notary public, notarized the Jeremys signatures on the assignment document. This assignment, together with the note, (which was not endorsed) and a second mortgage from Mr. Anderson and a second mortgage from Mrs. McOmer, and a two-page agreement prepared by Mr. Jeremy's attorneys, Romney and Nelson (Tr. 209, 211, 213, 214), were all transferred to Dr. Berman, who acknowledged receiving the same on October 10, 1959 ((Tr. 16, 17). Approximately 14 months later, in late November, or early December, 1960, Dr. Berman contacted the Jeremys and arranged to come by the following night "to have the Jeremys sign the note needed for his protection because someone in Idaho had a mortgage against his property" and Dr. Berman had to make certain that everything was legal, he said (Tr. 135, 136). The Jeremys had a pleasant visit with Dr. Berman and his wife, and showed certain alterations in the former Berman home, at which time Dr. Berman presented the note to Mr. Jeremy for his endorsement (Tr. 135). Mr. Jeremy was perplexed and telephoned a friend and lawyer, Merrill K. Davis, concerning the giving of an endorsement on the note and was told to sign it "without recourse." (Tr. 201). Mr. Jeremy added the words "without recourse" and he and his wife endorsed the note as requested. Dr. Berman and Mrs. Berman accepted the note without any comment and left (Tr. 14). At this time American Savings & Loan Co., the holder of the first mortgage on the former Jeremy home, which the Jeremys sold to Anderson and McOmber, was suing to foreclose the first mortgage. Dr. Berman and the Jeremys were named as defendants, because of the second mortgages given, which the Jeremys had assigned to Dr. Berman. Nothing was said by the Bermans concerning the lawsuit during their visit with the Jeremys.

Subsequently Dr. Berman, as a defendant and Cross-complainant, sued Mr. and Mrs. Jeremy as Cross-defendants and Respondents seeking judgment on the $4500.00 note, which Mr. and Mrs. Jeremy had assigned to him, together with the second mortgages.

Dr. Berman and Mr. and Mrs. Jeremy all testified that at no time had Dr. Berman ever made demand upon Mr. and Mrs. Jeremy for payment of the $4500.00 note, which monthly payments had become delinquent by Anderson and McOmber, nor had the Doctor ever notified them that the note was in default, although it became so shortly after Dr. Berman accepted it. The Doctor admitted that either he, or Mr. Webber, the real estate friend, made numerous demands upon Mr. Anderson for payments. It was still delinquent at the time Dr. Berman visited the Jeremys (Tr. 201).

POINTS URGED FOR DISMISSING APPEAL AND AFFIRMING JUDGMENT OF LOWER COURT

POINT I. APPELLANT (TRANSFEREE) WAS ENTITLED TO THE UNQUALIFIED ENDORSEMENT OF THE TRANSFEROR ONLY IF THERE WERE NO AGREEMENT TO THE CONTRARY; BOTH PARTIES USED A COMMON AGENT, (REAL ESTATE BROKER) AND NO WRONGDOING WAS INDICATED ON HIS PART.

The Parr vs. Pierce Bank & Trust Co., 100 Florida 941, 130 Southern 445, mentioned on page 7 of Appellant's Brief, from the excerpt quoted, seems to have merit. However, the fact situation shows the court held as it did in order to protect a widow (the assignee) from her bank (assignor) who had authority to invest her money for her in "dependable securities." The facts were: In January, 1926 the bank had received an $8000.00 note secured by a mortgage on real estate. It was a three year note with interest payable semi-annually. In August, 1927, the bank "assigned" the mortgage and note to the plaintiff, and "the money due" . . . with interest from the first day of July, 1926." (P. 943). The Court says that "on its face at the time of this 'assignment,' the makers of the note and mortgage were in default for non-payment of interest due January 1st, 1927 and July 1st, 1927. The bank then proceeded to charge the widow's account for the full sum of $8,00:00 at a time when the makers of the note had defaulted in two interest payments. The Court stated the bank should, instead, have declared the full sum of the debt due and foreclosed the mortgage because of the default (P.944). The widow was obliged to foreclose the mortgage and was left with a substantial deficiency. She now maintains the bank should have given her its unqualified endorsement on the note. As the Court says (P. 944) "equity looks upon that as done which should have been done." The Court required the bank to give its unqualified endorsement to the widow. The fact situation here clearly distinguished it from the one at issue.

In the Parr case the court quotes, from Brannen's N.I.L., Page 170 and 259 concerning Section 49 of the N.I.L. (Title 44-1-50 Utah Code Annotated 1953) which seems to relentlessly command an unqualified endorsement regardless of any agreement for lesser endorsement, as follows:

> "It certainly does not follow that Section 49 required an unqualified endorsement in every case. Section 49 does not specify any one kind of endorsement. In every case the transferee must go into a court of equity to compel an endorsement. Obviously he will be given the kind of endorsement to which he is entitled. If the parties agreed that the transferor was not to assume personal liability, an endorsement (without recourse) gives the transferee

> all that he is entitled to by common sense, by equity, or by Sections 49."

Appellant cites Fuchs vs. Leahy, 321 Mo. 47, 8 S.W. 2nd 897, on Page 9 of his brief. Part of the quotation is omitted by Appellant but is set out fully below with the omitted portion added and italicized. The Fuchs case, by the way, holds squarely against the Appellant's position. The entire quotation, which is significant, is:

> "Where two or more principals employ the same agent, whether as a means of dealing with one another, or to protect their common interests, one cannot charge the other not actually at fault with the misconduct of the *common agent. The latter owes no more duty to one than to the other; each of the principals is under equal duty to supervise the agent and protect his own interests, and* there is no reason why the misconduct of the agent should be imputed to one principal rather than to the other."

This case is intended to cite the law concerning the dual agent's rights and duties but is probably not applicable in our case for the reason that the Fuch's case was one in fraud and deceit. As stated, the court held that the plaintiff in that case was not entitled to a judgment against defendant. In the Fuchs case the negotiations between the plaintiff and the defendant were made through a real estate agent. The court held any misrepresentations were made by the real estate agent and not by the defendant. The court stated that each of the principals had an equal duty to supervise the agent and protect his own interest. (P. 56). This the plaintiff failed to do and he cannot recover. Respondent Jeremys urge that the Appellant, Dr. Berman, failed to supervise his friend, the real estate agent, Mr. Webber, if he, Dr. Berman were not agreeable to the arrangements Mr. Webber accepted from the Jeremys.

Neither of the cases cited by Appellant on Page 10 of the brief are applicable, namely the Owens vs. Schneider case, 85 Pac. 2nd 198, and Herdon vs. Hanson, 189 440, cases from California. Both of those cases involved fraudulent misrepresentations by the common agent. In the Owens case the common agent induced the plaintiff to exchange land with the defendant and the plaintiff suffered a loss by the agent's misrepresentations and concealments. In the Herdan case, also involving a common agent, the defendant, one of the principals, benefitted and profited by the false and fraudulent representations of the agent, and the defendant principal was held liable in damages. However both of these were fraud actions and neither are in point with Dr. Berman's case against the Jeremy's. Nowhere was it contended that Mr. Webber, the common agent, had made false, nor fraudulent misrepresentations, nor were the steps necessary to set up fraud indicated anywhere in the record.

The courts are in conflict, however, concerning whether the seller can recover from the buyer, even when there are fraudulent representations by the real estate broker. In the case of Ringer vs. Wilkin (1919) an Idaho case, 183 Pac. 986, the court held the seller is not liable to the buyer for fraudulent representations of the broker even though the seller gave no instructions and did not know the fraudulent representations were made. Neither principal, the court held, could be held for the tortious acts of the broker in the absence of collusion or participation by one of the principals in such tortious acts (P. 986, 988, 989). Two other cases, where fraud and deceit are not charged, hold that the plaintiff cannot recover damages. One of these is the case of Brown vs. St. John Trust Company, a Kansas case, 1905, 80 Pac. 37. The court held the plaintiff could not recover for damages caused in a contract with a defendant, where there was a common agent employed and paid for by both parties, when the common agent neglected his duties and caused the damage claimed.

In the case of Mason vs. Bernett (Washington) 1923, 218 Pac. 255, the buyer and seller of land had a common agent, wherein the seller paid a commission. The agent was consulted by the buyer on matters collateral to the sale of the land. The buyer thereafter claimed that she was advised that she could forfeit the payments made by her and terminate the contract at any time. However, the court stated that she could read and write, was a woman of some means, and with business experience. If she failed to read the note and mortgage involved herein, it was her own fault. The court stated the real estate broker was her agent concerning the legal effect of the collateral inquiries which she made, and the seller was not liable for any representations which the common agent made.

In a 1906 Texas case, Blair vs. Baird, 94 S.W. 116, the court likewise held that in a contract between a buyer and a seller of cattle, where both parties hired a joint agent to count the cattle, the seller was not liable for the misconduct of the joint agent, unless it was shown that the two conspired together to defraud the buyer of said cattle.

Nowhere in the record in Dr. Berman's action against Mr. and Mrs. Jeremy, is it charged, implied, or made out that there was any conspiracy, any fraudulent misrepresentations nor the elements of deceit charged to the real estate broker, Mr. Webber. Certainly none is charged to Mr. and Mrs. Jeremy. The Jeremys were total strangers to Mr. Webber prior to this sale; Dr. Berman and Mr. Webber, on the other hand, were friends and social acquaintances.

POINT II. RESPONDENT SHOULD NOT BE PENALIZED BECAUSE OF LACHES ON DR. BERMAN'S PART IN FAILING TO NOTIFY HIM OF THE DEFAULT OF THE NOTE OR OF THE NON-PAYMENT THEREOF, NOR FOR DR. BERMAN'S FAILING TO ACQUAINT HIMSELF WITH THE TERMS OF THE SALE OF HIS HOME TO MR. AND MRS. JEREMY.

Dr. Berman testified that, although he had examined the documents received from the Jeremys before the closing, he did not ask Mr. Webber, the real estate broker about the contract (Tr. 31), that he did not understand the payment arrangement for the same to be in mutual fund certificates over a ten year period, that he didn't examine the documents involved, but "assumed that everything was all right," (Tr. 31, 32, 33). Dr. Berman never noticed that the $4500.00 note was not endorsed, nor that one of the mortgages had been recorded and the other one not recorded when he examined them and accepted them (Tr. 34, 35). The Doctor further stated that he relied on the real estate broker who was a friend, socially and also a close acquaintance, although he admits he never told Mr. Webber what he wanted (Tr. 45, 46). Once, when Dr. Berman questioned the value of the note to Mr. Jeremy he was told that it was "good as gold" and that apparently satisfied him and he inquired no further, although a week or more of negotiations were in effect before the Jeremys purchased the home from Dr. Berman (Tr. 9,11).

The Pritchard vs. Strike case (66 Utah, 243 Pac. 114), a 1926 Utah decision, was quoted by appellant on Page 6 of his brief. The fact situation clearly distinguishes that case from the Berman-Jeremy controversy in the following particulars: In the Pritchard case the "endorsement" was on the note itself and used words of assignment to "assign, set over and deliver" the note and mortgage. This was a proper holding in view of the negotiable instruments law, according to Briton on Bills & Notes. He says: "If a holder of a negotiable instrument writes **on the back** thereof:"I hereby assign the within instrument to 'A' " or uses words of like import and signs his name thereto and delivers the instrument to 'A', such a transfer constitutes a negotiation of the instrument by endorsement and delivery, and is not mere assignment of the holder's rights." In the endorsement of a negotiable instrument on its back, the additional words such as "without recourse" or words of similar import are also required in order to make out a qualified endorsement. Britton on Bills and Notes, Page 230. Too, in the Pritchard case the "endorser" was the president of the company that made the note. As such he had full knowledge of the presentment, demand and nonpayment of it. In the most positive language he was told that the plaintiff (transferee) would look to him for the payment of it. This distinguishes the case from the Berman vs. Jeremy case.

Dr. Berman cites the Ackerman vs. Bramwell case, another Utah case, on Page 6 of his Brief, to support his claim that he is entitled to the Jeremy's unqualified endorsement. This case, however (80 Ut. 53, 12 Pac. 2nd 623) is a "fraud" case; the plaintiff (transferee) won in the District Court. On appeal the case was reversed and remanded for a new trial. In this Ackerman case, concerning the written assignment of a promissory note, **the lower court found that the transferror has unequivocally agreed to endorse the note for the plaintiff when she purchased it, and also "guaranteed its payment" to the plaintiff holder, and it was actually the "intention of the parties that the company was to endorse the note but had not done so."** (P. 60) (emphasis added). In the Ackerman case the assignment was represented to the plaintiff by the defendant as being an "endorsement and guaranty," but actually was not. In such a situation the holder was, of course, entitled to the endorsement of the transferor.

One of the leading Utah cases on assignment matters is Johnson vs. Beiky (64 Ut. 228 Pac. 189). In that case the assignment was made by the defendant in good faith and for a valuable consideration and prior to the service of the Writ of Execution on a bank who held the note as security. Johnson (the plaintiff and tranferee) relied upon N.I.L. (Sections 44-1-31, 32 and 33, UCA 1953), asserting that, inter alia, since the note was not actually delivered at the time of an assignment that he was entitled to a priority over the creditor. The Supreme Court held otherwise, and stated:

> "Like an ordinary chose in action, a bill or note may be transferred by assignment or by mere delivery with the usual incidence of such a transfer, and this rule is not changed by the negotiable instruments law. It may be formal or informal; it may be by separate instrument, or in the absence of a statute to the contrary, by parol." Continuing, the court said, "No doubt a promissory note may be transferred without endorsement, the same as any other article of personal property, either under our statute, or independant of statute."
>
> The Court then added the following significant statement, "Assignment" and "endorsement" as applied to negotiable instruments are not synonomous terms. An endorsement is not merely a transfer of title, but a new and substantive contract by which the endorser becomes a party to the instrument and liable, on certain conditions, for its payment. An assignment means a transfer of the title. It neither

includes nor implies becoming in any way a party to the payment, or responsible for the insolvency or default of the maker.

The Thatcher vs. Merriam case (121 Utah 191, 240 Pac. 2d, 266) also recognized that an assignment of a promissory note together with a deed of trust and chattel mortgage given in security was upheld as an **assignment** in this state.

In the case of Lawrence vs. Citizen's State Bank, 113 Kan. 724, 216 Pac. 262, also cited by Dr. Berman on page 7 of his Brief, the fact situation is clearly distinguished from the Berman-Jeremy controversy. In the Lawrence case no written assignment was involved, nor was there a claim of one; the plaintiff was merely seeking the endorsement on the note from the tranferor. The plaintiff had acquired from the defendant, in due course, certain notes which had not been endorsed and plaintiff sued for such endorsement. The court held that the plaintiff was entitled to the endorsment, "unless a qualified endorsement was agreed to by the parties, or is fairly to be implied from the circumstances involved in the transfer."

Appellant also stated, as being in accord with the Lawrence case the Queensboro National Bank of the City of New York vs. Kelly, 48 Fed. 2d. 574. The Queensboro case was a 1931 decision wherein the bank as payee sued Kelly as maker, to recover the principal and interest on a promissory note. The complaint was dismissed and the plaintiff appeared, and the case was reversed and remanded for a new trial. Although some mention of "assignments" and "endorsements" is made in the court's opinion, there is nothing helpful in this case to benefit either Dr. Berman or the Jeremys' in the issues involved here. In the Queensboro case the "assignment" was written on the margin of the note itself by the maker.

Likewise cited by the Appellant on page 7 of the Brief was Miller vs. Shelby County Investment Company, 30 S.W. 2d, 688. This was a 1930 Texas case and there was no "assignment paper" involved in that suit. The promissory note was transferred from the defendant to the plaintiff. The issue was whether the transferee was entitled to an endorsement because of defendant's "prior agreement" to give such endorsement. The court said, "Whether the transferor of the note agreed, at the time of the transfer, to endorse the note, was held to be a question of fact; an agreement to transfer the note is prima facie an agreement to transfer it in the usual way by endorsement; if a transferor delivers an instrument without an endorsement, upon good consideration, **It being agreed** that he would endorse, and he later refuses, equity may compel his endorsement. Further, where the note is transferred for value, with the understanding that the transferor is not to endorse, or that the endorsement is only for the purpose of conveying title, the transferor cannot be held as an endorser. When a note, for valuable consideration is transferred without endorsement, **there being no agreement regarding endorsement,** the transferee may compel an endorsement in equity." (Emphasis added) The court held that the transferor of the note had "promised to endorse it," and therefore required his endorsement. Another Texas case, Prewitt vs. Lloyd, 240 S.W. 1039, on a similar fact situation to the Miller case, held exactly opposite. There the jury found there was no promise by the defendant to endorse the note which had been transferred to the plaintiff. In neither of the Texas cases was there a question of an instrument of assignment involved, nor was there any claim of being a completed written assignment as existed between Dr. Berman and the Jeremys.

Both Dr. Berman and the Jeremys testified that Dr. Berman never made demand for payment upon the Jeremys at any time, including up to the time of trial. Dr Berman waited approximately 14 months before he sought the endorsement of the Jeremys and never made timely demand upon them for payment of the note which had been defaulted by Mr. Anderson.

In connection with Dr. Berman's failure in this regard, or to even notify them that the note was in default, the Jeremys refer to the case of Willard State Bank vs. Clarke, 208 Pac. 549, a Kansas case decided in 1922. Here the transferee received the note without the endorsement of the transferor. The maker defaulted in its payments. Two months and 11 days after the default, transferee of the note notified the transferor concerning the default and claimed it is now entitled to transferor's endorsement. The court held against the transferee on the grounds that the note must be presented on the due date to the maker, and if dishonored, the endorser must be promptly notified, either personally or by mail. Sections 44-1-91 to 99 inclusive, Utah Code Annotated, 1943, spell out this duty on the part of the transferee.

POINT III. ASSIGNMENT OF NEGOTIABLE PAPER, BY A SEPARATE INSTRUMENT OF ASSIGNMENT, IS LEGAL, ACCORDING TO THE AUTHORITIES, AND THE NEGOTIABLE INSTRUMENT LAW DOES NOT PREVENT SUCH ASSIGNMENTS.

In 4 American Jurisprudence, Section 75, page 287, it states that the only form required for an assignment is that it must comply with the fundamental requisites applicable to the contracts as respects "legality of object, capacity of parties, consideration and consent." No special form of words is necessary to effect an assignment. The only thing required is language showing an intention of the owner of the chose in action to "transfer" it. This is sufficient to vest the property in the assignee. Accord, 64 S.E. 264, (Georgia); 54 N.W. 867, (Iowa); 154 Pac. 210 (Kansas); 224 N.W. 720 (Wisconsin).

In Appellant's Brief, Page 5, he quotes Title 441-1-50, Utah Code Annoted, 1953, concerning the transferee's right to have the endorsement of the transferor. However, in applying this statute in the case of Thatcher vs. Merriam, 121 Ut. 191, 240 Pac. 2d, 266, the Court held that a bill or note may be transferred by assignment or by mere delivery with the usual incidence of such a transfer; and this rule is not changed by the Negotiable Instrument Law (Title 44, Utah Code Annotated 1953). Further, the assignment may be made by a separate instrument, and such an assignment was recognized and upheld.

On pages 8 and 9, the Appellant, in his Brief, argues that since there was "no language of limitation in the assignment of the note at the time of its transfer to Appellant Berman" that appellant is now entitled to an unqualified endorsement. Assignments ordinarily carry no "language of limitation" such as the words "without recourse" and words of other import. These qualifying endorsements are used in negotiable instruments and do not ordinarily appear on assignments. In this regard, both a qualified endorsement, such as would appear on a note, and an assignment instrument make certain warranties in that both represent that the document is genuine, that one has good title to it, that the prior parties had capacity to contract, and that one has no knowledge of any fact which would impair the validity of the instrument or render it valueless. Therefore, to add the further restrictive words, "without recourse," on an assignment instrument would seem to be both surplusage and redundant. In 8 Am. Jur. Section 301, Pages 38 and 39, the rule of law is stated that a bill or note, whether negotiable or non-negotiable, may be transferred by assignment. The negotiable instruments law does not prevent the transfer of a negotiable instrument by assignment. In further support of this proposition are the following cases: Capitol Hill State Bank vs. Rawlins National Bank (Wyo.), 160 Pac. 1171; Carter vs. Butler (Mo.) 174 S.W. 399; Edgar vs. Haines (Ohio), 141 N.E. 837; and Moore vs. Miller, 6 Ore. 254.

CONCLUSION

We respectfully submit that the Court was correct in giving judgment for the Jeremys and against Dr. Berman on the $4500.00 note and that the note had been legally transferred by the document of assignment.

We believe the court did not err in its conclusions and decision herein in light of all the testimony and evidence presented at the trial, including the memoranda of authorities submitted. The assignor-assignee relationship claimed by the Jeremys and disputed by Dr. Berman is a question of fact for the court. In this particular fact situation, most authorities researched uphold this type of assignment as being a valid one. The Anderson note was transferred to Dr. Berman by the Jeremys by separate instrument of assignment for the reasons heretofore stated; it was received by Dr. Berman, by his own testimony, as part payment and credit on the purchase of the house. He should not now be allowed to ignore that credit and require the Jeremys to honor the Anderson note, by contending that the Jeremys were unqualified endorsers of such note in view of the many other facts presented during the trial of the case.

Respectfully submitted,

MERRILL K. DAVIS
Of DAVIS and BAYLES

Attorneys for Cross-Defendants
and Respondents